

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARL BAIRD

Claimant

VS.

EAGLE STEEL ERECTORS, INC.

Respondent

AND

INSURANCE COMPANY OF NORTH AMERICA

Insurance Carrier

Docket No. 184,120

ORDER

Respondent appeals from an August 31, 1994 Preliminary Hearing Order by Administrative Law Judge Steven J. Howard which granted claimant's request for medical benefits and designated an authorized treating physician.

ISSUES

On appeal, respondent contends the Administrative Law Judge exceeded his jurisdiction by granting benefits because the evidence does not establish that claimant suffered an accidental injury arising out of and in the course of his employment with the respondent and that timely notice was not provided to the respondent pursuant to K.S.A. 44-520 (Ensley).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds for purposes of preliminary hearing that the claimant's current need for medical treatment is the result of personal injury by accident which arose out of and in the course of claimant's employment with the respondent. This conclusion by the Appeals Board is based upon the uncontroverted testimony of the claimant, two of claimant's co-workers and the medical evidence.

Claimant testified that he was injured on or about September 1, 1992 when he fell a distance of between three (3) to five (5) feet landing on his left shoulder. Two of claimant's co-workers testified that although they did not actually see the claimant fall, they did hear a bang or commotion which caused them to look up in time to see the claimant getting up off the floor. Claimant immediately complained of injuring his shoulder. One of the co-workers, Reynold Davis, testified that he continued to work with claimant for a period of three (3) to four (4) months, during which time the claimant continued to mention that his shoulder bothered him.

Claimant first sought medical treatment at the emergency room of Research Belton Medical Center on March 18, 1993. He gave a history of having fallen at work in early September of 1992 and landing on his left shoulder. His pain had not worsened, but

neither had it improved. The medical records in evidence are consistent in attributing claimant's condition to his work-related injury.

Claimant failed to give respondent notice of his injury within ten (10) days, as required by K.S.A. 44-520 (Ensley). However, respondent has failed to establish prejudice resulted from claimant's failure to provide timely notice. There is no indication that claimant's condition worsened due to the delay in treatment. The only witnesses to testify concerning the accident gave consistent descriptions. There is no indication that the delay prejudiced respondent's ability to investigate the accident with respect to whether or not claimant did suffer injury at work.

Respondent attempts to raise for the first time on appeal the issue of whether timely written claim was made. This issue was not raised at the Preliminary Hearing before the Administrative Law Judge. It would be unfair to permit the respondent to raise this issue for the first time on appeal because the claimant would be denied an opportunity to put on evidence pertaining to the question of timely written claim. Therefore, the Appeals Board will not address that issue at this time.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the August 31, 1994 Order of Administrative Law Judge Steven J. Howard should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas Stein, Kansas City, MO
Michael W. Downing, Kansas City, MO
Steven J. Howard, Administrative Law Judge
George Gomez, Director